

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

PAGE PLACE APARTMENTS, LLC

v.

STOUGHTON ZONING BOARD OF APPEALS

No. 04-08

DECISION

February 1, 2005

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
PAGE PLACE APARTMENTS, LLC,)	
Appellant)	
)	
v.)	No. 04-08
)	
STOUGHTON BOARD OF APPEALS,)	
Appellee)	
_____)	

DECISION

This is an appeal, pursuant to G.L. c. 40B §§ 20-23, brought by Appellant, Page Place Apartments, LLC (Page Place), from a decision of the Stoughton Zoning Board of Appeals, denying a comprehensive permit for the construction of two buildings housing forty-two family rental units, nine of which would be affordable units, to be funded by the MassDevelopment Rental Program, and located on approximately 2.2 acres of land at 243 Page Street, Stoughton, Massachusetts. The Board denied the project arguing that it is too close to an unsafe intersection, did not provide adequate access, and that the project was too dense for the site. Appellant also challenges the Board's imposition of attorney fees.

I. PROCEDURAL HISTORY

On March 18, 2003, Appellant submitted an application to the Stoughton Zoning Board of Appeals for a comprehensive permit in accordance with G.L. c. 40B, §§ 20-23, to build forty-eight units of affordable rental housing in two buildings. A public hearing was duly noticed and commenced May 22, 2003, and continued on July 26, 2003, September 4, 2003, September 25, 2003, November 13, 2003, and December 18, 2003, and closed February 10, 2004.¹ During the public hearings, Appellant agreed to decrease the number of units to forty-two, with nine affordable units. The Board voted to deny the application on March 2, 2004, and a copy of the written decision was filed with the Town Clerk on March 26, 2004.

On April 12, 2004, Page Place filed an appeal of the Board's decision with this Committee in compliance with G.L.c. 40B, § 22. The Committee conducted a site visit, held a 2-day de novo hearing, with witnesses sworn and full rights of cross examination, and a stenographic transcript of hearing. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the developer must be a limited dividend organization, and it must control the site. 760 CMR 31.01(1)(a)-(c). The parties stipulate that Page Place is a limited dividend organization, that the project is fundable under

the MassDevelopment Rental Program, and that Appellant controls the project site. Pre-Hearing Order, § II-3, 4, 5. In addition, the Board stipulates that the Town of Stoughton has not satisfied any of the statutory minima defined in G.L. c. 40B, § 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § II-2.

II. FACTUAL BACKGROUND

The project area includes 2.2 acres of land, situated at the intersection of Page and Turnpike Streets (Route 139), just off of Route 24. Exh. 1. Appellant proposes to construct two, three story buildings housing a total of forty-two family rental units, nine of which would be affordable for low-income families earning equal to or less than 50% of the median income for the applicable statistical area. One building will contain 18 two-bedroom rental units and the second will contain 24 two-bedroom rental units. Tr. I, 82-83. There will be 97 parking spaces, or 2-1/2 spaces per unit, including 4 handicapped spaces. Tr. I, 13.

Immediately across Page Street and to the west of the project area is Saint James Catholic Church, which was recently closed. Tr. I, 43; Exh. 7. Directly abutting Saint James Church to the south, is an apartment complex, Stoughton Village, consisting of two, three-story buildings, and a third building that is a six-story building on one side, having been built into a slope. Tr. I, 93. To the north of the project site, is Cabot Place, which is a three-story commercial building. Tr. I, 93. The project area is zoned as neighborhood business, which

1. In addition, there were three working sessions held on January 7, 2004; February 10, 2004; and March 2, 2004.

allows for commercial, retail, or office use.² Tr. I, 20. There are no wetlands on the site. Tr. I, 19.

III. ISSUES

Where the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a prima facie case by showing that its proposal complies with state and federal requirements or with generally recognized design standards as to matters of health, safety, the environment, design, open space, or other matters of local concern. 760 CMR 31.06(2).

The burden then shifts to the Board, requiring a two-step inquiry to determine whether the denial by the Board complies with G.L. c. 40B, § 23. The Board must initially establish that there is a valid health, safety, environmental, design, open space, or other local concern, which supports the denial. 760 CMR 31.06(6). If the Board can establish the existence of a valid local concern, it must then further demonstrate that the local concern outweighs the regional need for housing. 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 412 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Two local concerns have been raised in this case. The first is a concern for traffic safety both entering and exiting the site and at the intersection of Page and Turnpike Streets.

2. The neighborhood business designation also allows for up to 50% building coverage on the lot.

The second is a concern for density and intensity of the project.

A. Traffic Concerns

The Board identified three key traffic concerns with respect to the proposed project.

Tr. II, 16. The first is with the incidence of traffic accidents at the Page and Turnpike Street intersection (Intersection). Tr. II, 16. The second concern is for the poor level of service and queuing length of vehicles along the eastbound approach on Page Street. Tr. II, 17. The third concern is for the danger and difficulty of accessing the project site due to the queue of vehicles that extends across the project driveway. Tr. II, 17. We note that the second and third concerns are actually one concern, which can be identified as a site access issue.

During the hearing, Appellant offered into evidence a “Technical Memorandum – Page Place Apartments, Stoughton, MA, Evaluation of Traffic Impacts” (traffic study),³ completed for the project area and the testimony of a civil engineer who is an expert in the area of traffic impact, signal analysis, and highway design. Tr. II, 49; Exh. 4. The expert testified that the proposed project would generate twenty-six additional trips in the morning peak hours between seven and nine, and forty-five during the evening peak hours between four and six. Tr. I, 54, 57; Exh. 4. Accordingly, the project will not change the operation of

3. The data used in the traffic study was derived from the Environmental Notification Form (ENF) submitted to the State of Massachusetts Executive Office of Environmental Affairs, for the proposed Campanelli Commerce Park (Campanelli Study), which is located directly across the Page and Turnpike intersection to the south of the project area. The data for the ENF was collected in 2003 and as it overlapped as to the study area with the current project area, it was used to examine the impacts of this project on the intersection. Exh. 4. The Board did not object to the use of the data from the Campanelli Study, nor did it argue that the use of this data was in some way inappropriate or inaccurate. Therefore it is accepted as a reasonable source of information in creating the traffic study for the current project.

the Intersection.⁴ Tr. I, 54, 57; Exh. 4.

Also offered into evidence, was the “Peer Review Memorandum (peer review memo)” completed for the Board by an engineering firm with expertise in “transportation, communications, building technologies, and site and facility design.” Exh. 6. According to this review, the traffic study “documented the traffic information and followed the standard procedures, which are acceptable and complete.” Exh. 6. Furthermore, the peer review “concur[s] with the report findings and conclusions that the proposed project will have minimal impact on the transportation system adjacent to the site. . . . We have also reviewed the site plans of the proposed site as they pertain to emergency vehicle access and egress. . . . It appears that the parking layout in front of the buildings will be sufficient for fire truck access and egress.” Exh. 6.

In responding to the traffic study and peer review memo, the Board offered the testimony of a civil engineer who is an expert on transportation and traffic. Tr. II, 5-63. This witness is from the same engineering firm that completed the original peer review, but he was not the engineer who completed that review. Tr. II, 6. This witness testified that the traffic study should also have included an analysis of the intersection crash rate, an analysis of sight distance for the site driveway, and a quantification of truck traffic for the intersection. Tr. II, 24-25. What concern the Board had with the sight distance for the project was not developed during the hearing nor was it briefed. Although the Board’s Post-

4. “Level of Service is a measure of traffic operation at a particular intersection. It’s given a letter function from A to F; A being very good, less congestion, less delay, and F meaning gridlock. You have long delays and long queues at the intersection.” Tr. I, 53-54. According to the traffic report, the Level of Service for the morning peak hour period was a level of service “C” and “D” for evening peak hours, with or without the construction of the proposed project. Tr. I, 54-55; Exh. 4.

Hearing Brief refers to a statement made by its civil engineer that an evaluation of sight distance for the site driveway should have been completed, it does not point to anywhere in the testimony or to other evidence to suggest that there is any problem with sight distance. Board's Post-Hearing Brief at 7; Tr. II, 23-24. Based on demonstrative evidence provided as part of this hearing, sight distance for this site does not pose a problem, as Page Street is a straight street in both directions with no obstruction of views at the existing access to the site. Exhibit 7 & 9F. As the Board failed to articulate its traffic concern for sight distance for the site driveway, or to develop this issue through testimony or in its Post-Hearing Brief, this issue is deemed waived.⁵ See *An-Co, Inc. v. Haverhill Board of Appeals*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

On the issue of truck traffic, the Board's witness testified he made visual observations, but did not count the number of trucks or complete any formal analysis in formulating his estimate that the volume of truck traffic was greater than 5% and therefore required a quantification of truck traffic as part of the traffic study. Tr. II, 26-27; Board's Post-Hearing Brief at 5. Appellant's witness testified on cross-examination that although it had not been included in the traffic study, a truck traffic count had been completed for the Intersection in the Campanelli Study and that count determined that about "2 percent of the vehicles on Turnpike

5. In its Objections to the Committee's Proposed Decision, p. 5-6 (filed Jan. 19, 2005), the Board requests that this Committee adopt the "conditions" that were included in the Board's decision denying the comprehensive permit. Without authority, it asserts that those conditions remain valid since the developer "failed to prove that any of these conditions should be stricken...." There is no such burden upon the developer, and in fact, during the hearing, very few of the issues raised by these "conditions" were pursued in any depth. Further, many of the "conditions" raise programmatic issues or legal issues that should be left to the subsidizing agency. One exception to this is Condition 15. That concerns an

[Street] were trucks, which is not a high number.” Tr. I, 69. The Committee is “free to ignore or discount, on the basis of credibility, any or all of the offered expert testimony it heard.

Moreover, [the Committee is] free to accept or reject any of the conflicting evidence presented to it.” *Board of Assessors v. Iodice*, 29 Mass. App. Ct. 1014, 1016, 565 N.E.2d 454 (1991).

We accept the testimony of Appellant’s expert on this issue, having been based on an actual analysis of the volume of truck traffic, versus the unconfirmed observations made by the Board’s expert during his relatively brief visit to the site.⁶

1. Crash Rate at the Intersection

The Board’s witness obtained crash rate data for the intersection from Massachusetts Highway Department (Mass. Highway) and from the Stoughton Police Department for a three-year period from 2000-2002. Tr. II, 29. He testified that he used this data to determine that the crash rate for the intersection is 1.2 crashes per million vehicles,⁷ which is greater

easement to improve Page Street, which would address traffic issues that *were* considered in detail. We incorporate that condition into this decision. See § V-2(b), below.

6. The actual local concern involving truck traffic is a concern that the residents living in the apartments will be bothered by the truck noise. Tr. II, 27. The expert offered by the Board was a civil engineer who has expertise in engineering, transportation, and traffic. Tr. II, 5. There is nothing in his testimony to indicate that he is an expert in acoustics, noise, or any related field. Furthermore, no explanation or evidence was provided on this issue to indicate that the noise from truck traffic would adversely impact the health or safety of the residents of the proposed development. The Board’s argument is instead that noise from the truck traffic could potentially be “extremely intrusive.” Board’s Post-Hearing Brief at 5.

7. According to this witness, he prepared the crash rate data analysis that resulted in a determination of the 1.2 crashes per million vehicles entering. Tr. II, 29. The analysis “involves taking the average number of crashes that have occurred over that three-year period, and then using the total traffic volume that occurs during a 24 hour period. . . . The analysis essentially computes the number of crashes which occur per million vehicles entering the intersection on any approach. . . . The proponent’s traffic analysis did not include the 24 hour traffic volume for the intersection. So we estimated that the peak hour volumes that were included in the proponent’s traffic analysis comprised ten percent of the [Average Daily Traffic (ADT)] volume. So based upon that, we estimated that the ADT volume at this intersection was *thirty-five hundred vehicles*, and all of the aforesaid resulted in a crash rate of 1.2 crashes per million vehicles entering the intersection.”

than the state and local rate of 0.87 crashes per million vehicles. Tr. II, 31. Based on this data, the witness testified that residents of this development would be forced to use an intersection that is more dangerous than a typical intersection in the state or district. Tr. II, 58. However, on cross-examination, the witness testified that the 0.87 rate represents averages of a variety of intersections, some with a lower accident rate and some with higher accident rates. Tr. II, 58.

The testimony offered by the Board's witness on this issue was extemporaneous, and failed to include any discussion on the relevance of the average crash rate or why it is significant that the Intersection is above the average. The witness did not know if his estimate of 1.2 crashes per million vehicles indicated that this was an unacceptably high accident rate or if the Intersection was listed on the "one thousand list."⁸ Tr. II, 58. He also testified that he did not personally collect any data or complete any on-site traffic analysis or studies for the project area. Tr. II, 43-46. In cross-examination of this witness, Appellant offered evidence showing proposed mitigation for the Intersection, which includes new pavement markings on the westbound approach and the modification of the eastbound approach to include a short left-hand turn lane. Tr. II, 51-54; Exh. 10. The Board's witness testified he had no way of determining if these improvements would have a positive impact

Tr. II, 29-30. However, according to Appellant's witness, "if you look at what is going on around that intersection, it's not a rural area. It happens to be, Page Street happens to be a collector road in an urban area. And it going right into an urban arterial which is Turnpike Street. I looked at the traffic numbers from Page Street based on the Campanelli report. We are talking *over 7,500 vehicles* on a daily basis on Page Street just east of Turnpike Road." Tr. I, 65. Although the Appellant's witness indicates that he was referring to Page Street on the opposite side of the intersection from the project area, the testimony still suggests that the estimation of the 24 hour traffic volume of 3,500 vehicles used by the Board's witness may have been too low (versus the 7,500 referred to by the Appellant's witness), which would in turn result in a higher overall crash rate.

on the crash rate without completing an evaluation of how the Intersection would operate with the improvements. Tr. II, 53-54.

The Board did not explain why or how the “above-average” crash rate for the Intersection translates into a valid local concern.⁹ The Board’s witness stated that the occupants of the proposed housing would be “forced to use an intersection that is more dangerous than a typical intersection in the state or the district,” but did not provide the Committee with any supporting testimony or evidence that such a typical intersection even exists locally or to show that the occupants would be a any greater risk than would be associated with any other housing development in the Town. Tr. II, 58. The witness could not testify that the occupants of the development would add to accidents at the Intersection, but instead stated that “it would add slightly in the sense that it would add to the million vehicles entering” the Intersection. Tr. II, 58.

The testimony of the Board’s witness does not provide the Committee with any evidence or information to indicate that the project fails to comply with state or local laws or regulations, or even any generally recognized standards. Nor has the Board indicated how the “crash rate” translates into a significant safety hazard for the occupants of the proposed apartment complex that would outweigh the need for affordable housing.

Based on the evidence provided during this hearing, specifically the traffic study and associated expert testimony, the Committee finds that Page Place has established that the

8. The “one thousand list” is a reference to the Massachusetts Highway Department’s “1997–99 Top Thousand High-Crash Intersections List,” which is list of the state’s top 1,000 crash locations.

9. A much larger apartment complex exists directly across Page Street from the proposed site. The residents of this complex must also use the Intersection.

project as proposed complies with state and federal requirements or with generally recognized standards for traffic safety.

2. Access to the Development

Since the developer has established that the proposed project complies with generally recognized standards for traffic safety, it is the Board's burden to establish that the entrance to the proposed project is inadequate and poses a valid local safety concern. 760 CMR 31.06(5). The project proposes one entrance, which is located on Page Street. Tr. II, 18; Exh. 2B. According to the Board's traffic expert, during the first half hour of heavier traffic flow in the evening, from around five to five-thirty p.m., vehicles will back up and block access into and out of the site. Tr. II, 18-24. The back up of traffic begins at the stop sign at Turnpike Street and extends back westerly to Page Street, with an average of perhaps twelve to fifteen vehicles, and reaching as many as twenty vehicles. Tr. II, 18-19. Any queue greater than 10 vehicles blocks the access to the project site. Tr. II, 19. According to this witness any vehicle wanting to turn left out of the site during these times of higher traffic will be blocked and unable to exit safely. Tr. II, 19. He also testified that although he did not take measurements during his observations while visiting the site in the morning peak hours, he expect that there would be a similar queuing of cars in the morning peak travel hours. Tr. II, 20.

In support of his testimony, the witness offered eight photographs taken during the morning peak hours for traffic use, identified as being between seven-thirty and nine in the morning. Tr. II, 59; Exh. 9A-H. The photographs do not show congestion occurring in front of the proposed project site. In fact, the photographs show dispersed traffic traveling through

the intersection of Page and Turnpike Streets without any visible traffic congestion. Exh. 9A-H. Exhibit 9D is a view across the project site with Saint James Church in the background, looking across Page Street. Exh. 9D. No vehicles are visible in the picture and no line of cars block the entrance to the project area. Exh. 9D. Exhibit 9F is a view looking southeast down Page Street toward the Intersection. There are no vehicles present along the entire stretch of the street and no cars waiting to turn off of Page Street at the Intersection. Exh. 9F.

It is reasonable to expect that the photographic evidence taken during the morning peak hours and offered in support of the witness's testimony would show the lines of traffic queuing from the Intersection to the entrance of the project area. Instead, the photographs show no vehicles in front of the proposed project site during these peak hours. It is also difficult for the Committee to find credible the witness's testimony that a line of 10 vehicles starting at the Intersection and backed up along Page Street toward the project area will block the project entrance, since the entrance to the project area is over 300 feet from the Intersection and the average passenger car length is obviously not 30 feet in length. Tr. II, 19; Exh. 2B; see also Board's Post-Hearing Brief at 6. Instead, the Committee finds the evidence offered by the Board on this issue to be contradictory, as the demonstrative evidence is not supportive of the witness's testimony. *Board of Assessors v. Iodice*, 29 Mass. App. Ct. 1014, 1016, 565 N.E.2d 454 (1991). Therefore, the Board has failed to establish that the single entrance to the project poses a valid local safety concern.

B. Density and Intensity

The Board also argues that the project as proposed is too dense for the site, is inappropriately situated in an area that is commercial in nature, the recreational facilities on site are inadequate, and that it is not in keeping with the principles of “Smart Growth”¹⁰ as it fails to provide access to public transportation and grocery stores.

1. Density

An analysis of density involves determining the impact of the development on factors ranging from municipal services and traffic to esthetics and overall livability of the surrounding neighborhood.” See *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 20 (Mass. Housing Appeals Committee Jan. 8, 1998). Density usually refers to a large area or neighborhood. It may be used to compare a proposed development to the neighborhood, often in the context of the impact of a large development on municipal services or overall aesthetics. *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 4 (Mass. Housing Appeals Committee, Jan. 28, 1993).

The site density is approximately 20 units per acre. Tr. I, 37. Appellant’s expert witness testified that based on his review,¹¹ the development was not too dense for the site,

10. Although both sides pointed to aspects of the project that were either in keeping with or in opposition to “smart growth,” neither party provided evidence that would help to define the principles of smart growth in Massachusetts. Neither party identified smart growth as an issue in the Pre-Hearing Order and as both parties treat it as an undefined concept, the issue merits no further consideration in this case.

11. In examining the proposed project on the issue of density, the witness testified that he, “looked at the site plan itself to see what was being placed on the site. In this case we were looking at mainly buildings and parking being placed on the site as well as the open space around those features. I looked at the zoning regulations to see what they said in regards to the development such as this, that is the town of Stoughton zoning regulations. I visited the site to look at abutting land uses, surrounding land uses, basically the context of the site. I also looked at other parts of the community

nor would the density be out of character with what was happening on property abutting the site or in the Town in general. Tr. I, 82. The witness's testimony was supported by the submission into evidence of thirteen assessors' cards for properties with multifamily developments within the Town of Stoughton that are similar to, or greater than the density of units proposed for this site.¹² Tr. I, 88. Exh.

Immediately across Page Street and to the west of the project area, is Saint James Catholic Church, which was recently closed. Tr. I, 43; Exh. 7. Directly abutting Saint James Church to the south, is an apartment complex, Stoughton Village, consisting of two, three-story buildings, and a third building that is a six-story building on one side, having been built into a slope. Tr. I, 93. To the north of the project site, is Cabot Place, which is a three-story commercial building. Tr. I, 93. The project area is zoned as neighborhood business, which allows for commercial, retail, or office use. Tr. I, 20. The project as proposed appears to be in keeping with the development that already exists in this area of Stoughton.

Traffic issues were addressed in the previous section of this decision and the Board has failed to establish that the amount of traffic generated by the project will have an adverse impact on existing roads or on the Intersection. No issues regarding municipal services have been raised. Therefore, the Board has failed to offer evidence to support an argument that the proposed use of this site is not in keeping with the surrounding neighborhood or that the density is unusual for this area or for similar projects within the Town of Stoughton.

to see how others, how projects such as this, what their settings and density might be. I also read the decision by the Zoning Board of Appeals and also did some research on 40B developments in the state and what those guidelines are for development of 40B projects." Tr. I, 81-82.

12. Eight of these properties have unit per acre densities that are greater than that proposed by Appellant for this site. Exh. 8.

2. Intensity

Intensity involves the functioning of the housing on the particular site, which includes questions such as the adequacy of open space and recreational space, the functionality of common areas, the provisions made for the privacy of the tenants, the accessibility of the site to and from other parts of the neighborhood, and related factors which look to whether the number of units are too large not for the surrounding area but for the particular parcel of land. See *Hastings Village*, No. 95-05, slip op. at 26. Intensity is used in discussing the adequacy of the proportion of unbuilt to built space (i.e., the adequacy of open space or recreational space) on a particular site. *Canton Housing Authority v. Canton*, No. 91-12, slip op. at 4 (Mass. Housing Appeals Committee, Jan. 28, 1993).

The Board's concerns are more closely aligned with intensity, in that it argues that the site affords no recreational space and is adversely impacted by traffic noise. According to the Board's expert witness, most of the site is taken up by the two buildings with much of the remaining portion of the site being required for parking or for detention basins. Tr. II, 37. The only recreational amenity is a small recreation area, which is right at the edge of the extremely noisy and heavily traversed Turnpike Road. Tr. II, 37.

Appellant's expert witness on planning testified that the project does not raise concerns about overuse of the site. Tr. I, 38. According to this witness 41% of the 2.2 acres of land within the project area will be open area, not covered by buildings or paving.¹³ Tr. I,

13. The Board in its Post-Hearing Brief argues the current case is similar to *CMA, Inc. v. Westborough*, No. 89-25, (Mass. Housing Appeals Committee, Jun. 25, 1992). According to the Board, in that case the Committee ordered a reduction in the number of units, despite having 56 percent "open space." However, what the Board fails to note is that the 56 percent open space cited in CMA was actually found to be covered by parking lots or sidewalks, except for one corner of the

26-27. The project includes a 1600 square foot playground and a 5000 square foot detention basin. Tr. I, 26 & 35. Although the detention basin may contain water for a brief period after rainstorms, it is otherwise appropriate for recreational activities. Tr. I, 26-28.

The targeted rental group would be younger couples that may or may not have young children and older adults that no longer have children living with them. Tr. I, 83. The sites proximity to the interchange of Route 24 would make it attractive to individuals commuting to work and who use the highway system to get to work. Tr. I, 92. In addition to the small recreation area on site, there is a playground located to the south across the Intersection from the proposed project area. Tr. I, 35. Although this playground is not easily accessible by walking, it is within a very short driving distance from the project area. Exh. 7.

We find that the project as proposed is adequate to accommodate the needs of the intended occupants and the project is within a short driving distances to at least one other recreational facility.

The Board asserts that noise from truck traffic is so intrusive to support denial of the permit or in the very least, to require that any permit issued be for a lesser number of housing units to allow placement of the buildings in a manner that it believes will lessen the amount of noise impact on the occupants. As we stated above, the expert offered by the Board to address the noise issue was a civil engineer who has expertise in engineering, transportation and traffic. There is nothing in his qualifications to indicate that he is an expert in acoustics,

site which was a wetland area. See *CMA*, slip op. at 26. The witness for the Appellant testified in the current case that the 41 percent open space excludes buildings or paving. Tr. I, 26-27.

noise, or any related field.¹⁴ Tr. II, 5. No other evidence was provided by the Board to establish truck traffic noise as a health or safety concern that could result in harm to the residents of the proposed development. Therefore, the Board has failed to establish that noise from truck traffic is a valid local concern.

We conclude that the intensity of uses on the site is not so great as to create a substantial local concern.

IV. PAYMENT OF ATTORNEY FEES

The final issue presented to the Committee in this case, is the request by Appellant for reimbursement of some of the funds paid into the Town's Review Fee for outside consultants (Fee). According to Appellant, it is seeking the return of that portion of the Fee used to pay for the Town's legal expenses in relation to the Board's review of Page Place's comprehensive permit application. Appellant argues that fees charged under G.L. c. 40B, § 21 and G.L. c. 44, § 53, are intended to cover the cost for the Board to engage consultants to conduct a review of the technical data of the proposed project, but is not intended to include the cost of legal assistance. In response, the Board argues that the Housing Appeals Committee has no jurisdiction over this issue, as the Committee's jurisdiction is "limited to

14. This witness's testimony consisted of his statement that in "standing at the edge of Turnpike Street, the noise was extremely intrusive. I mean, it was the key thing that you were aware of more than anything else. It was totally distracting. It was very, very loud. For the reason of noise . . . I think it is just unsuitable for residential use, for any residential use." Tr. II, 36. The witness's testimony amounts to "scant evidence" at best and is inadequate to draw a rational inference, let alone to support the conclusion, that truck noise adjacent to the site is a serious local health, safety or design concern. See *Alholm v. Wareham*, 371 Mass. 621, 627, 358 N.E.2d 789 (1976); *Sullivan v. Town of Brookline*, 416 Mass. 825, 826, 626 N.E.2d 870 (1994).

issues of whether ... the decision of the board was reasonable and consistent with local needs ...” as stated in G.L. c. 40B.¹⁵

A. Committee’s Jurisdiction to Review Fees Related to Comprehensive Permits

In establishing the Committee’s jurisdiction to address this issue, we direct the Board’s attention to the holding of the Supreme Judicial Court in *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 368 N.E.2d 393 (1973). In *Hanover*, the Court determined that by enacting G.L. c. 40B, the Legislature intended to provide a mechanism for relief from exclusionary zoning practices,¹⁶ defined as any local requirements or regulations that prevent the construction of affordable housing. See *Id.* at 354. What is more germane to the current discussion, however, is the Court’s holding that the Housing Appeals Committee has the authority to override, when necessary, *local requirements and regulations*, including zoning bylaws and ordinances, in order to promote the construction of low and moderate income housing in cities and town. See *Id.* at 355-356, 363. Therefore, Section 22 cannot be read as narrowly as argued by the Board. Such an interpretation would provide a means by which some municipalities could frustrate the intent of the statute by charging excessive or inappropriate fees as a means by which to prevent the construction of affordable housing.

This Committee has previously stated that we have grave doubts about the enforceability of any unilaterally imposed requirement that attempts to shift the town’s legal

15. It could also be argued that any time a board requires an applicant to pay attorney fees or any other type of additional fee or payment that is above and beyond a reasonably established permitting fee, especially if that fee is not charged to other members of the community for similar types of services, it is unreasonable and not in keeping with local needs. The charging of such fees may also contribute to making a permitted project “uneconomic.”

16. One of the eight local restrictive practices indicated as having the potential to negatively impact the construction of affordable housing was the charging of permit fees. See *id.* at 348.

expenses to the applicant, and we again acknowledge that we do not approve of it. See *John Owens v. Belmont*, No. 89-21, slip op. at 16 (Mass. Housing Appeals Committee June 25, 1992). More recently we stated that requiring an applicant to pay the town's attorney costs could deter some developers from applying for a comprehensive permit, particularly for projects involving a small number of units. *Pyburn Realty Trust v. Lynnfield*, No. 02-23, slip op. at 23 (Mass. Housing Appeals Committee, Mar. 22, 2004).

The Board further argues that even if the Committee has jurisdiction over this issue, the attorney fees charged in this case were properly charged to assist the Board in reviewing the underlying comprehensive permit. Board's Post-Hearing Brief at 11. The Board charges and retains a "project review fee" pursuant to G.L. c. 44, § 53, which allows "a city or town that provides by rules promulgated under [G.L. c. 40B] for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account." 18B *Mass. Prac. Municipal Law and Practice* § 1456 (1993). See also Exh. 12 at 10. This is the same argument presented to the Committee in *Pyburn Realty Trust v. Lynnfield*, No. 02-23, slip op. at 23 (Mass. Housing Appeals Committee, Mar. 22, 2004). As indicated in the analysis of that case, "General Laws c. 44, s. 53G, does not authorize a local board to assess . . . fees, but only authorizes a local board to deposit any fees collected in a special account." *TBI, Inc. v. Board of Health of North Andover*, 431 Mass. 9, 18, 725 N.E.2d 188 (2000). Therefore, 53G implies that the authority to collect these fees must be derived from some other source and specifically refers to G.L. c. 40B, § 21. "An administrative agency has considerable leeway in interpreting a statute it is charged with enforcing, and regulations adopted by the agency stand on the same footing as statutes, with reasonable presumptions to

be made in favor of their validity.” *Student No. 9 v. Board of Educ.*, 440 Mass. 752 (2004).

As the Committee has already determined that nothing in G.L. c. 40B, § 21, suggests that the payment of attorney fees is considered part of “outside consultant review fees,” the Board must refund \$3,441.70,¹⁷ paid by Appellant for the Town’s attorney fees. See *Pyburn*, slip op. at 22.

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee concludes that the decision of the Stoughton Board of Appeals is not consistent with local needs. The decision of the Board is vacated and the Board is directed to issue a comprehensive permit as provided in the text of this decision and the conditions below.

1. The comprehensive permit shall conform to the application submitted to the Board except as provided in this decision.

2. The comprehensive permit shall be subject to the following conditions:

a. The development shall be constructed as shown on drawings entitled “Page Place Apartments, Page Street in Stoughton, Massachusetts,” dated February 7, 2003, and January 6, 2004. Exhibits 2A-2H, 5.

17. Although the parties were asked to state precisely the amount of the fee that was disputed, neither provided that information. This figure is based on review of the Town’s General Ledger Report and billing statements from Kopelman and Paige, P.C. These documents were submitted by Appellant in its opposition filed on September 29, 2004. The Board did not dispute the amounts listed in these attachments.

b. The developer shall grant a twenty-foot-wide easement to the town of Stoughton for expansion and reconfiguration of Page Street.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

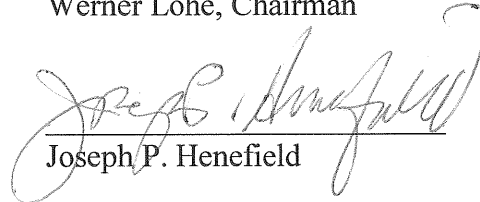
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, s. 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Date: February 1, 200⁵~~4~~

Housing Appeals Committee




Werner Lohe, Chairman



Joseph P. Henefield



Marion V. McEttrick



Glenna J. Sheveland
Presiding Officer